



Local Coalition Defends Rights-of-Way Management, Compensation Practices

By Barrie Tabin Berger

Regulatory action that severely limits or otherwise changes the way local governments are permitted to manage and collect compensation for use of the public rights of way would have far-reaching implications.

The Federal Communications Commission (FCC) released a notice of inquiry (NOI) on April 7, 2011, titled “Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting.”¹ The purpose of the NOI was to obtain detailed information regarding local governments’ rights-of-way² management and compensation practices and policies. The FCC maintains that the NOI is intended to help the agency with its understanding of these practices and how they may be related to facilitating or obstructing broadband deployment around the country. The commission seeks to compile a detailed record of broadband deployment issues to give it a factual basis for determining the nature and extent of any problems.

COALITION COMMENTS

The Government Finance Officers Association (GFOA), along with a broader coalition of national associations representing local governments,³ submitted comments in response to the NOI. Regulatory action by the FCC that severely limits or otherwise changes the way local governments are permitted to manage and collect compensation for use of the public rights of way would have far-reaching implications for jurisdictions around the country, such as reducing local government

revenue used to enhance public interest objectives (e.g., ensuring the public safety, maintaining roadways, and making other infrastructure investments).

The GFOA and its local government partners have long followed FCC initiatives to preempt or limit local government rights-of-way authority. For nearly two decades, the associations representing local governments, together with their legal counsel,⁴ have been asked to demonstrate in numerous FCC filings that local governments successfully employ practices that allow a range of competing industries to use the public rights of way for the benefit of the community. In 2011, these benefits include practices to encourage rapid broadband deployment and adoption.

The FCC’s recent NOI again asks local governments to defend their practices regarding rights of way, and the local government coalition submitted comments challenging the FCC’s implication that local rights-of-way management and compensation practices are thwarting broadband deployment in communities around the country (as the NOI title affirms). These comments stress the important role local rights-of-way management plays in protecting the safety and health of the public, and urge the commission to reject overzealous federal regulation of these management and compensation practices.

Instead, the local government coalition suggests that the FCC work cooperatively with its state and local partners through intergovernmental committees and task force groups. The comments also address the FCC's lack of legal authority to regulate local rights-of-way practices.

LOCAL GOVERNMENTS SEEK INCREASED BROADBAND ACCESS

The local government coalition's comments to the FCC explain that increasing broadband deployment and adoption is a priority for localities. Affordable broadband stimulates the economy and creates jobs, and it benefits consumers and makes government more efficient and responsive. Therefore, localities continue to develop policies that encourage rapid broadband deployment and adoption across their communities. When the communications industry has ignored calls for broadband deployment, many jurisdictions have constructed their own systems to provide the services their first responders, schools, libraries, businesses, and residents want and need.

THE ROLE OF MANAGEMENT AND COMPENSATION

Local right-of-way practices and fees do not deter broadband deployment or adoption, and the local government coalition's comments urge the FCC to resist federal regulation in this area, discussing the ways rights-of-way practices serve critical interests in local communities — helping local governments ensure that a scarce public resource, central to the everyday life of a community, can be protected, shared, and

developed. Local practices protect public health and safety; encourage economic development; facilitate the efficient use of public property; promote a sustainable community; and dictate fair compensation for the private use of public property. These local practices include distinct disciplines — the management of streets, the oversight of environmentally sensitive areas, the platting of new subdivisions, and the leasing of public property. Practices vary from state to state and community to community because each jurisdiction presents unique challenges based on its make-up and infrastructure and policy choices.

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The fees communications providers pay to operate in the public rights of way offset the costs the governments incur in acquiring, maintaining, and managing a local community's assets. If these fees were cut, taxpayers would be subsidizing the operations of for-profit companies. The comments therefore urge the FCC to rebuff industry entreaties to wade into this issue. Federal regulation would not only be unlawful, but would create an enormous regulatory burden on local governments that might force them to abandon or curtail activities designed to promote broadband adoption. It could also result in an immediate loss of revenue for many communities.

There is no evidence to suggest that higher rights-of-way fees affect broadband adoption. Supporting this point is the fact that many communities with high rights-of-way fees have greater deployment and competition among providers than do communities where these fees are significantly lower. In fact, the economic studies provided with the coalition's comments, as well as the commission's own analysis, indicate that factors such as affordability, digital literacy, service quality, and the difficulty of setting up in certain rural areas are the real impediments to broadband deployment and adoption.

WHAT THE COMMISSION SHOULD DO

The FCC should not ask local governments to spend scarce resources on responding to open-ended NOI questions as a means of promoting broadband deployment. Instead, the commission should complete the work it promised Congress and local governments it would undertake as part of the National Broadband Plan.⁵ In that document, the commission proposed to recreate a committee of state, local, federal, and tribal entities to discuss rights-of-way management and compensation practices, and recommend best practices. This group would mirror the structure of the FCC's 1997-2003 Local and State Government Advisory Committee.

The comments also encourage the FCC to explore potential avenues for fostering a spirit of cooperation between broadband providers and local governments. Suggestions include a strictly voluntary, non-binding mediation program to help address disputes between

localities and providers, or providing educational resources to the public and industry on key issues and affirming the importance of complying with local rights-of-way practices.

LACK OF JURISDICTION

The final matter the local government coalition addresses is the FCC's complete lack of legal authority to regulate rights-of-way issues; FCC regulation of local rights-of-way practices would violate Section 253 (c) of the Telecommunications Act of 1996. This provision specifically states that states and localities shall have the ability to manage the public rights-of-way and require fair and reasonable compensation from communications providers for their use. Supporting this position is the legislative history of Section 253(c) of the Telecommunications Act, as well as several court opinions interpreting the Congressional meaning and intent of Section 253 (c). Both the legislative history and the court opinions reveal Congress' desire to leave rights-of-way management and compensation decisions squarely within the hands of local governments. The coalition's comments urge the commission to do the same.

Any FCC regulation of rights-of-way practices would raise serious constitutional concerns. In particular, the coalition expressed concern that compelling local governments to give communications providers access to the public rights-of-way without requiring fair compensation would create Fifth Amendment takings issues. Similarly, preempting local rights-of-way practices and compensation would offend against the Tenth Amendment.

CONCLUSIONS

Right-of-way practices — although critical to balancing competing interests in a community — are a minor factor in the deployment calculus of broadband providers. If the FCC has not in fact prejudged these issues, it should have little trouble supporting the local government's position that its time and resources are better spent on other initiatives.

The GFOA and its coalition partners will continue to monitor and respond to any FCC activity that seeks to severely limit or preempt local government's ability to manage the public rights-of-way and receive fair and reasonable compensation for its use. |

Notes

1. See the FCC notice of inquiry at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-51A1.doc.
2. Public rights of way can be broadly defined as land and facilities that are maintained and regulated for the public and used for the direct and indirect services governments provide, such as the mobility of people and products; water supply and wastewater treatment; and energy and communication systems.
3. The GFOA's partners in the local government coalition are the National League of Cities, the United States Conference of Mayors, the National Association of Counties, the International City/County Management Association, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, and the American Public Works Association.
4. The law firm of Best Best & Krieger (formerly with the firm of Miller & Van Eaton) provided valuable assistance in responding to the FCC's NOI.
5. The National Broadband Plan, which the FCC reported to Congress in March 2010, lays out a comprehensive strategy to increase broadband deployment across the country.

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